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IN THE

Supreme Court of the United States

OCTOBER TERM.

No. 440.

JOHN A. LAIRD, Petitioner,

v.

UNITED SHIPYARDS, INC., JOSEPH W. POWELL, HUBERT E. ROGERS, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION OF THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK.

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Opinions Below.

The Opinion of the District Court (R. 1230-1250) is unreported. The Opinion of the Circuit Court of Appeals is reported at 163 F. (2d) 12.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered August 13, 1947 (R. 1280). The petition for a writ of certiorari was filed November 13, 1947 and served November 14, 1947. The jurisdiction of this Court is

invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Involved.

The petition for certiorari, implying (Pet., p. 2) that the court below ignored state law in violation of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64 (1938), and *Guaranty Trust Co.* v. *York,* 326 U. S. 99 (1945), misstates the issues. The only possible questions which could justifiably be presented on this petition are:

(1) Whether the court below correctly interpreted and applied decisions of the New York Courts pursuant to which it held that the New York ten year statute of limitations bars the action.

(2) Whether the District Court correctly applied New York law in dismissing the action on the merits upon the basis of the Record and its Findings of Fact.

Reason for Denying Petition.

The petition fails to show that this case was decided "probably in conflict with applicable local decisions". Contrary to the claim in the petition, both courts below applied New York law, not "federal" law. The District Court's dismissal on the merits, based primarily upon the facts, is in conformity with applicable New York law as exemplified by decisions of the New York courts cited in its opinion. The Circuit Court of Appeals, expressly recognizing that *Guaranty Trust Co.* v. *York, supra* (decided after the District Court opinion), required application of

the New York statute of limitations, dismissed solely on that basis, in strict conformity with this Court's mandate in that case.

Statute Involved.

The New York statute of limitations upon the basis of which the Circuit Court of Appeals affirmed dismissal of the action herein is Section 53 of the New York Civil Practice Act, reading as follows:

> "§53. **Limitation Where None Specifically Prescribed.** An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

Statement.

This is a derivative stockholders' suit, commenced September 18, 1940, to recover alleged secret promoters' profits claimed to have been made more than 11 years prior to commencement of the action by Respondents Rogers and Powell through their receipt of 4,400 shares of preferred stock in the Crane and Shewan transactions incident to the organization of the predecessor of Respondent United Shipyards, Inc. (hereinafter called "United") in February, 1929, and to impress a constructive trust upon stock then obtained by Respondents other than United (Amended Complaint, Prayers A and C, R. 46.40). Respondent The Chase National Bank of the City of New York (hereinafter called the "Bank") was sued as an alleged co-participant in the breach of fiduciary obligation charged to Respondents Rogers and Powell (R. 1279).

After a trial which lasted eight days (R. 2), the District Court entered a final judgment of dismissal on the

merits (R. 1270). In its Opinion (R. 1230-1250) and Findings (R. 1251-1269) the District Court specifically found that there had been no fraud, breach of fiduciary obligation or overreaching by any of the defendants (R. 1236, 1237, 1238, 1240; R. 1254, 1259-60, 1266-67) and also ruled that the confirmation of a plan in a 77-B reorganization proceeding of the corporate defendant was *res adjudicata* (R. 1249, 1269). The District Court left undecided the defense of the New York statute of limitations pleaded by the defendants (R. 1250, 1269), but made a finding that the cause of action accrued more than 10 years prior to commencement of the action (Finding 83, R. 1267).

On appeal, the Circuit Court of Appeals for the Second Circuit reviewed the facts at length in its opinion (R. 1274-1279), specifically referring without disagreement to the District Court's Findings as to the absence of fraud and overreaching (R. 1275, 1278, 1279), and then disposed of the appeal solely on the basis of the statute of limitations defense not ruled on by the District Court, writing:

> "in our opinion the New York statute of limitations is a bar to the suit" (R. 1279).

Plaintiff's contention is that the Bank in making a $1,700,000 loan to Respondents Powell and Rogers was a co-participant with them in the Shewan and Crane transactions, involving an alleged breach of their fiduciary obligation to United, and that it so participated because it was an insufficiently secured creditor of the W. & A. Fletcher Co. whose assets were acquired by United. But so complete was plaintiff's failure of proof as against the Bank that the trial court at the close of the case commented (R. 1620) as follows:

"The Court: I can't see where the Chase is in any way, shape or manner involved. That is the way I feel."

Moreover, consistent with the affirmative and uncontradicted evidence directly disproving plaintiff's contentions as against the Bank (Ex. L-1, R. 727, at 731; R. 154, 100-101; 52, 127; 48, 53, 121), the District Court made specific Findings of Fact, as follows:

(1) The Fletcher loan was sufficiently secured for the Bank to have reasonably anticipated realization of the full amount loaned regardless of the consummation of the transactions complained of. (Findings 19, 20 and 21, R. 1254.)

(2) "Neither The Chase nor any other defendant participated in any scheme or conspiracy in connection with the formation of United or the purchase of its properties." (Finding 18, R. 1254.)

(3) The Bank's $1,700,000 loan to Messrs. Powell and Rogers was not even broached to it "until two or three days prior to the closing date", and "was made by The Chase in the ordinary course of business and not for any improper motive or pursuant to any scheme or conspiracy". (Findings 39, 40 and 41, R. 1259.)

(4) "The Chase * * * with reference to the Crane and Shewan transactions, did not participate with Messrs. Powell and Rogers or any other defendants in any scheme or conspiracy to defraud United or to make secret profits at the expense of United and did not make any such secret profit." (Finding 42, R. 1259-1260.)

(5) "The Chase * * * did not share with Messrs. Powell and Rogers in any profit secret or otherwise

which they might have made out of the Crane and Shewan transactions." (Finding 43, R. 1260.)

(6) "None of the defendants or any of them conspired to defraud or injure United or any of its stockholders, present or prospective, nor did the defendants nor any of them conspire to gain a profit at the expense of United or any of its stockholders." (Finding 79, R. 1266.)

The Circuit Court of Appeals, after carefully analyzing the facts, stated with reference to the Bank (R. 1279):

> "The Chase Bank was alleged to have aided in the breaches of fiduciary duty charged to Rogers and Powell as above set forth, it being argued that it was an insufficiently secured creditor of the W. & A. Fletcher Co., and thus moved so to do, **though that was neither found nor proved.**" (Emphasis ours.)

Argument.

1. The Court Below Correctly Held the Suit Barred by the Applicable New York Ten-Year Statute of Limitations.

The District Court in dismissing on the merits found it unnecessary to rule upon the defense of the statute of limitations (R. 1250), because, as the Circuit Court of Appeals pointed out in its opinion (R. 1279), the District Court's decision antedated *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945).[1] However, the appeal was argued after that decision, which made it so clear that the action was barred by the New York ten-year statute of limitations

[1]It should be noted that plaintiff contended in the District Court that this action was a purely equitable one to which only laches, and not the state statute of limitations applied (Pl. Supp. Tr. Br., p. 90; Rep. Br., pp. 10-41).

that the Circuit Court of Appeals disposed of the case *solely* on that basis, and in strict compliance with this Court's mandate in the *Guaranty Trust* case, writing (R. 1279):

> "We find it unnecessary to set forth in greater detail either the facts found or the claims made by the respective parties for in our opinion the New York statute of limitations is a bar to the suit.
>
> "There was no allegation or proof of fraud of the kind which is found in *Reno* v. *Bull,* 226 N. Y. 546, 550. Such fraud must necessarily be pleaded and proved to establish a cause of action on which, by virtue of Sec. 48(5) of the Civil Practice Act, the statute does not begin to run until discovery. *Hastings* v. *Byllesby & Co.,* 293 N. Y. 404. Consequently, there was no coupling of an allegation of such fraud with an allegation of a breach of fiduciary duty to make *Mannaberg* v. *Klausner,* 294 N. Y. 859, applicable. Here we have but a suit on the derivation of a corporation whose fiduciaries, it is alleged, have committed breaches of their duty to it. It has been proved and found that at the time such alleged breaches of duty occurred all parties then having any interest in, or holding any position of responsibility to, the corporation were fully aware of all the facts. That was no later than February 28, 1929, and then the alleged cause of action accrued. *Hastings* v. *Byllesby & Co., supra; Lever* v. *Guaranty Trust Co.,* 262 App. Div. 1044; aff'd 289 N. Y. 615. Nor is the statute tolled because those alleged to have been derelict in their duty were in control of the corporation. *Hastings* v. *Byllesby & Co., supra.*
>
> "It may be that the trial judge did not base his decision upon this ground because *Guaranty Trust Co.* v. *York,* 326 U. S. 99, had not then been decided. That case now shows conclusively that the New York statute of limitations does apply. That statute, as

> construed by the New York courts, had run before this suit was brought."

This represents an accurate summary and application of New York law. See, in addition to the cases cited by the Circuit Court of Appeals, *Teich* v. *Lawrence,* 291 N. Y. 245, 249 (1943); *Gobel, Inc.* v. *Hammerslough,* 288 N. Y. 653 (1942); *American Cities Power & Light Corp.* v. *Williams,* 69 N. Y. Supp. (2d) 197,202-3 (Sup. Ct., N. Y. Co., Mar. 20, 1947).

Petitioner, in an effort to enlist the interest of this Court in the petition for certiorari, claims no less than four times in the petition *(i. e.,* pp. 1, 2, 6, 14) that the present suit sounds in fraud and deceit. But a mere examination of the amended complaint shows that it is solely in equity for an accounting for profits. Plaintiff neither pleaded nor proved the classic elements of a fraud action, namely, misrepresentation, *scienter,* reliance and damage, *all* of which, under the decisions of the New York courts *(supra)* must be pleaded and proved in order to make applicable the "fraud" statute of limitations in Section 48(5) of the New York Civil Practice Act. It was because of the complete failure to plead or prove facts necessary to a fraud action, not because of any "federal rule" on promoter's liability,[2] that the Circuit Court of Appeals correctly rejected the claim now relied on in the petition

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[2] The petition erroneously states (p. 14) that "Respondents have never denied that if petitioner and the other purchasers were original stockholders, the discovery provision of the statute of limitations applied." On the contrary, both in the Trial Court (Pr. Tr. Memo., pp. 26-27) and on appeal (Br., pp. 21-24) the Bank contended that the "fraud" statute of limitations was not applicable because no fraud action was pleaded or proved regardless of whether petitioner was an original stockholder or not.

(made for the first time before the Circuit Court of Appeals), stating (R. 1279):

> "there was no allegation or proof of fraud of the kind which is found in *Reno* v. *Bull,* 226 N. Y. 546, 550."

In short, petitioner's argument that the court below failed to comply with the requirements of *Guaranty Trust Co.* v. *York,* 326 U. S. 99 (1945), is wholly without validity.

2. In Dismissing on the Merits for Plaintiff's Failure to Prove Fraud, Conspiracy or Breach of Fiduciary Obligation, the District Court Correctly Applied New York Law, Not Any So-Called "Federal" Rule.

The primary basis upon which petitioner seeks certiorari is his contention that the court below applied what petitioner chooses to call (Pet. pp. 1, 8) "the 'federal' rule" as to promoters' liability, instead of applying the New York law on this subject as required by *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64 (1938) (see Pet. pp. 1-2, 7-15).

Petitioner's argument overlooks the fact that, as above shown, the Circuit Court of Appeals, after independently reviewing the facts in its opinion, placed its decision of affirmance squarely upon the New York statute of limitations, which it construed and applied correctly in accordance with New York decisions.

Beyond this, petitioner's argument completely ignores that the District Court, in dismissing on the merits, did so not on the basis of federal law as against state law or vice versa, but on the basis of express findings of fact set forth in its opinion, that:

> "(1) I am satisfied from the explanation that it was not a secret profit fraudulently secured" (R. 1236);

(2) "nothing was secret. * * * There was no attempt at concealment." (R. 1237);

(3) "It is really a conspiracy that is charged. The evidence discloses no such scheme or conspiracy, neither may one be spelled out from the facts. Plaintiff has failed to make out a case against either the Bank or Aldred." (R. 1240).

But even assuming, *arguendo*, that the decision on the merits was based primarily upon a rule of law that a promoter's profit acquiesced in by the vendors and the bankers binds the corporation, including those who purchase shares from the bankers, that rule of law is the *New York rule*,[3] as exemplified in the leading case of *Blum* v. *Whitney*, 185 N. Y. 232, 241, 247 (1906), which has been consistently applied by the New York courts, without deviation, for more than seventy years. See *Seymour* v. *Spring Forest Cemetery Assn.*, 144 N. Y. 333, 340 (1895); *Thornton* v. *Wabash Ry. Co.*, 81 N. Y. 462, 467 (1880); *Continental Securities Co.* v. *Belmont*, 168 App. Div. 483, 489-490 (2nd Dept., 1915), affd. 222 N. Y. 673 (1918); *Bostwick* v. *Young*, 118 App. Div. 490, 496 (3rd Dept., 1907), affd. 194 N. Y. 516 (1909); *Insurance Press* v. *Montauk Wire Co.*, 103 App. Div. 472, 477-480 (1st Dept., 1905); *Goldstein* v. *Tri-Continental Corp'n*, N. Y. L. J. Dec. 19, 1940, p. 2116, (Sup. Ct. N. Y. Co., 1940); *East Lake Lumber Co.* v. *Van Gorder*, 105 Misc. 704, 715 (Sup. Ct., Erie Co., 1919); *Schlesinger* v. *Fisk*, 60 Misc. 442, 442-3 (Sup. Ct., N. Y. Co., 1908); *Flanagan* v. *Lyon*, 54 Misc. 372, 377-378 (Sup. Ct., N. Y. Co., 1907); *Parsons* v. *Hayes*, 14 Abb. N. C. 419, 432-434 (Super. Ct., 1883).

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[3] If there is any different "federal" rule on this subject, it must be that embodied in *McCandless* v. *Furlaud*, 296 U. S. 140 (1935), which petitioner himself contends (Pet., p. 8) is *contrary* to the New York rule applied in this case.

Petitioner's repeated attempt to distinguish the present case upon the ground that the bankers who had purchased the stock of United had arranged to sell the same through the issuance of their interim receipts to the plaintiff and others, represents an approach which has often and explicitly been rejected by the New York Courts. See *Hutchinson* v. *Simpson*, 92 App. Div. 382 (1st Dept. 1904);[4] *Goldstein* v. *Tri-Continental Corp.*, N. Y. L. J., Dec. 19, 1940, p. 2116 (Sup. Ct., N. Y. Co. 1940). In the case last cited, the Court wrote:

> "* * * *Blum* v. *Whitney* (185 N. Y. 232) appears to hold that a subsequent stockholder is not such an interested or defrauded party that he can successfully attack the transaction. To state it differently, he would not be the 'party injured'. The line of demarcation which the plaintiff essays to etch between the Blum case and his own, is too tenuous for discernment. *In that case, too, the promoters purchased most of the stock with the intention to sell it to the public, and this intention was executed at considerable profit to the promoters.* In other re-

[4] *Hutchinson* v. *Simpson*, holds squarely that holders of interim receipts issued by bankers are not stockholders for purposes of the rule of *Blum* v. *Whitney*. It should be noted that petitioner cites for what he contends to be the New York rule only two lower court decisions, relying mainly upon *Midwood Park Co.* v. *Baker*, 128 N. Y. Supp. 954 (1910), where the facts are wholly distinguishable, where the lower court opinion did not even pass upon this point and where no opinion was written by any appellate court. Apparently unable to distinguish *Hutchinson* v. *Simpson*, Petitioner (Pet. fn. p. 11) states that "the case has never been cited" by the Court of Appeals. But the case clearly represents the law of New York on the point, for it was deemed *controlling* in the Appellate Division decision in *Blum* v. *Whitney*, 111 App. Div. 922 (1st Dept. 1906), which the Court of Appeals affirmed 185 N. Y. 232 (1906), and was cited with approval *after* the *Midwood Park* case in *Continental Securities Co.* v. *Belmont*, 168 App. Div. 483, 490 (2d Dept. 1915) aff'd 222 N. Y. 673 (1918).

> spects as well that case and the present bear a striking similarity." (Emphasis ours.)

In an attempt to lend some color to the contention that "federal", and not state law was applied, the petition omits from a quotation from the District Court's opinion (Pet., p. 13, n. 6) the following highly significant passage which makes it clear that the District Judge applied the law of New York (R. 1238-9):

> "In *Blum* v. *Whitney,* 185 N. Y. 232, the New York Court of Appeals laid down the rule that where all those in interest have knowledge of the facts no wrong has been done the corporation. This appears to still be the law of New York. See, *Goldstein* v. *Tri-Continental Corp.* (Sup. Ct., N. Y. Co., 1940), N. Y. L. J., December 19, 1940, p. 2116."

3. There is No Basis for Granting a Writ of Certiorari in this Case.

The petition does not show that the court below "decided an important question of local law in a way probably in conflict with applicable local decisions."

A reversal of the Circuit Court of Appeals decision that this suit is barred by the New York ten-year statute of limitations and of the District Court's dismissal on the merits would require this Court to overrule the detailed and specific Findings of Fact made by the District Court (see *supra,* pp. 5-6 and 9-10) to the effect that there was no fraud or conspiracy and that the Bank did not participate in any wrongdoing. The summary of the facts made by the Circuit Court of Appeals in its opinion indicates clearly its agreement with these basic Findings of Fact (R. 1275, 1278, 1279). The petition should therefore be rejected because in effect it requests this Court to set aside

concurrent Findings by two courts below, in a situation where no conflict of decision among Circuit Courts of Appeal exists or could exist. Cf. *Goodyear Tire & Rubber Co., Inc.*, v. *Ray-O-Vac Co.*, 321 U. S. 275, 278 (1944).

Conclusion.

The courts below correctly applied the law of New York, both as to the statute of limitations and on the merits. The petition raises no question of general importance, and should accordingly be denied.

Dated, December 2, 1947.

Respectfully submitted,

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